IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 4, 2002 Session

FLYNN'S LICK COMMUNITY CENTER & VOLUNTEER FIRE DEPARTMENT
v.
BURLINGTON INSURANCE COMPANY

An Appeal from the Circuit Court for Jackson County
No. 1384-0-262 John D. Wootten, Jr., Judge

No. M2002-00256-COA-R3-CV - Filed July 31, 2003

This is a claim under the Tennessee Consumer Protection Act. In 1997, the plaintiff community center purchased liability insurance from the defendant insurance company for an annual Halloween event described as a "haunted house and hay ride." During the event, an accident occurred on the hayride. Later, three lawsuits were filed against the community center by parties who were allegedly injured in the hayride accident. The community center filed a claim with the insurance company. The insurance company provided a defense under a reservation of rights but disputed coverage. The insurance company then filed a declaratory judgment action in federal court on the issue of whether the claim was covered under the policy. While the federal suit was pending, the insurance company paid to settle the three underlying claims. Thereafter, the federal suit was dismissed by stipulation of the parties. The community center filed the instant lawsuit under the Tennessee Consumer Protection Act, Tennessee Code Annotated § 47-18-101 *et seq.*, seeking about $20,000 in attorney's fees it expended in defending the federal action. It alleged that the insurance company engaged in unfair and deceptive conduct by filing the declaratory judgment action. After a jury trial, the jury held in favor of the insurance company. The community center now appeals. We affirm the jury's verdict, finding that the trial court committed no reversible error, and that the jury's verdict was supported by material evidence in the record.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Richard M. Brooks, Carthage, Tennessee, and Michael E. Evans, Nashville, Tennessee, for the appellant, Flynn's Lick Community Center & Volunteer Fire Department.

John R. Hellinger and Raymond G. Prince, Nashville, Tennessee, for the appellee, Burlington Insurance Company.

OPINION

Plaintiff/Appellant Flynn's Lick Community Center & Volunteer Fire Department ("Flynn's Lick") is a non-profit organization established in Jackson County, Tennessee. Defendant/Appellee Burlington Insurance Company ("Burlington" or "the insurance company") is an insurance company that underwrites, among other things, commercial general liability insurance coverage.

Flynn's Lick operates an annual fund-raising event around the time of Halloween each year that features a hayride and a haunted house known as "Spooky Hollow." From 1993 through 1997, Flynn's Lick purchased an insurance policy from Burlington, through insurance agent John Anderson ("Anderson"), solely to cover the Halloween event. In 1997, Flynn's Lick representative, Vernon Ragland ("Ragland"), was designated to secure and maintain the insurance policy. The declarations page for the insurance policy purchased in 1997 characterized Flynn's Lick's business as "Special Event Haunted House & Hay Ride." The "Description of Hazards" and "Description of Operations" in the policy also listed the insured event as a "Haunted House & Hay Ride." In 1997, the policy was in effect between October 17 and November 2, when the event was scheduled to take place.

On October 17, 1997, during a hayride at the event,[1] an accident occurred, resulting in injuries. In 1998, three lawsuits were filed against Flynn's Lick by parties allegedly injured in the accident. Flynn's Lick notified Burlington of the lawsuits, asserting a claim under their liability insurance policy.

On August 19, 1998, Burlington adjuster B. J. Cleaver ("Cleaver") wrote Flynn's Lick a letter, stating that the lawsuits gave "rise to some potential coverage questions under the . . . insurance policy." Cleaver told Flynn's Lick that Burlington would provide a defense in the pending lawsuits, but informed Flynn's Lick that Burlington would nevertheless be "initiating and conducting an investigation of this matter under a full reservation of rights." In order to provide a defense in the three lawsuits, Burlington retained attorney Kim Burnette ("Burnette") to defend Flynn's Lick.

After the investigation of coverage had begun, Burlington assigned adjuster Cleaver to handle the defense of Flynn's Lick. It assigned a separate adjuster, Claude Fulbright ("Fulbright"), to handle the coverage issues.[2] Burlington retained attorney Parks Chastain ("Chastain") to investigate the coverage issues.

After an investigation, Chastain advised Burlington that he did not believe that the injuries resulting from the hayride were covered under the policy. In reaching this conclusion, Chastain

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[1] Apparently, the hayride was used as transportation to and from the haunted house, making a few stops along the way.

[2] Splitting the responsibility between adjusters in such a manner is common in the insurance industry.

noted that the hayride was actually a truck pulling a trailer, and believed that this fell under the following exclusions in the policy for injuries arising out of the use of an automobile:

> Exclusions
>
> This insurance does not apply:
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> * * *
>
> (b) to "bodily injury" or "property damage" arising out of the ownership, maintenance, operation, use, loading or unloading of
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> (1) any "automobile" or aircraft owned or operated by or rented or loaned to any "insured," or
>
> (2) any other "automobile" or aircraft operated by any person in the course of his employment by any "insured";
>
> * * *
>
> (d) to "bodily injury" or "property damage" arising out of and in the course of the transportation of "mobile equipment" by an "automobile" owned or operated by or rented or loaned to any "insured" . . . .

See Insurance Policy, Exhibit 3 ("automobile exclusion" and "mobile equipment exclusion," collectively referred to as "automobile exclusions"). Consequently, on December 30, 1998, defense adjuster Cleaver, on behalf of Burlington, wrote Flynn's Lick a letter telling them that the investigation was complete and that Burlington was of the opinion that Flynn's Lick's losses were not covered, based on the automobile exclusions noted above. Cleaver told Flynn's Lick that Burlington planned to file a declaratory judgment action in federal district court on whether Flynn's Lick's losses were covered under the policy. She told Flynn's Lick that the legal defense that had been provided in the tort claims would be withdrawn if Burlington prevailed in the declaratory judgment action.

On January 7, 1999, Burlington filed the promised declaratory judgment action in federal district court. It sought a declaration that Burlington owed no duty to defend or indemnify Flynn's Lick for claims arising out of the October 17 accident. Flynn's Lick retained attorneys Richard M. Brooks and Michael E. Evans to defend it in the federal lawsuit.

In June or July 1999, coverage adjuster Fulbright and defense attorney Burnette attended a settlement conference related to the tort suits. The lawsuits were settled. In the settlements, Burlington paid between $60,000 and $70,000 on behalf of Flynn's Lick, effectively covering Flynn's Lick's losses under the policy.

Subsequently, on July 14, 1999, a Stipulation of Dismissal was approved by the federal district court in the declaratory judgment action. The declaratory action was dismissed "without prejudice to the parties' rights to pursue any further recovery or remedy they deem necessary." Flynn's Lick sought to recover the attorney's fees it incurred in defending the federal action, approximately $20,000. This request was denied.

As a result, on November 8, 1999, Flynn's Lick filed the instant lawsuit against Burlington, claiming that Burlington violated the Tennessee Consumer Protection Act, Tennessee Code Annotated § 47-18-101 *et seq.* ("the Act"),[3] in its dealings with Flynn's Lick.[4] In the lawsuit, Flynn's lick alleged that Burlington acted in bad faith and in an unfair or deceptive manner in initially refusing to cover Flynn's Lick under the policy, and also in filing the federal action and forcing Flynn's Lick to incur legal expenses related to that claim. Flynn's Lick argued that there would have been no need for Burlington to file the federal declaratory judgment action if Burlington had first consulted with Anderson, the agent who facilitated the purchase of insurance. Thus, Flynn's Lick alleged, Burlington's conduct was unfair and deceptive and constituted a violation of the Act.

On September 18 through 20, 2001, the case was tried before a jury. The first witness was Ragland, the Flynn's Lick representative who secured the insurance policy. Ragland explained that the haunted house and hayride had been an annual event for fifteen or sixteen years, and that Flynn's Lick had purchased liability insurance for the event each year since 1993. Ragland described the hayride as actually a truck pulling a flatbed trailer for about six tenths of a mile, making about four stops along the way. He had assumed that the insurance policy covered injuries arising out of the hayride, but admitted that he had not read the entire insurance policy. Ragland said that he met with insurance agent Anderson in November 1998, and afterwards he believed that the insurance covered Flynn's Lick's claim. Ragland testified that the attorneys he hired to defend Flynn's Lick in the federal action charged $150 per hour, and that the total bill related to that lawsuit was $20,000. Ragland was unaware of any fraudulent acts committed by Burlington, but felt that Burlington acted unfairly or deceptively in not paying Flynn's Lick's claims when they were first made.

The insurance agent, Anderson, also testified at trial. He described himself as an independent insurance agent, and said that he obtained the commercial insurance policy from Burlington for

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[3] The Act provides for a private right of action for any "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn. Code Ann. § 47-18-104(a) (2001). The Act also contains a nonexclusive list of unfair or deceptive acts that are prohibited. Tenn. Code Ann. § 47-18-104(b) (2001). While that list does not address the acts or practices of insurance companies, it includes a general "catch all" provision which prohibits "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person." Tenn. Code Ann. § 47-18-104(27) (2001). Under either of these sections, Flynn's Lick could seek recovery under the Act. ***See Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 925-26 (Tenn. 1998) (holding that an insurance company may be exposed to liability under the Consumer Protection Act).

[4] Flynn's Lick also claimed that "Burlington dealt with Flynn's Lick in bad faith, caused it to incur additional expense, and should be punished accordingly pursuant to [Tennessee Code Annotated §] 56-7-105." However, from the record, it appears that Flynn's Lick did not pursue a claim for bad faith refusal to pay under that statute. Rather, it relied solely on its claim of deceptive and fraudulent conduct, in violation of the Consumer Protection Act.

Flynn's Lick. He testified that he had not been aware that a truck pulled the hayride, and said that Burlington did not ask him about the type of hayride that was involved. Anderson felt that Flynn's Lick was covered under the policy for its loss.

Anderson was asked whether he represented the insured or the insurer. In response, Anderson said that he represented the people buying the insurance, and that he viewed his job as being the "go-between" from the insured to the insurer. Anderson said that, the day after the accident, Flynn's Lick contacted him and told him about the accident. Anderson filled out a loss report and sent it to the insurance company. Later, Anderson was told that Burlington was taking the position that the hayride was not covered, based on the automobile exclusions. Anderson conveyed that information to Flynn's Lick, and tried to assure Flynn's Lick that there was coverage, stating, "you can sue me and I don't blame you a bit and I will turn around and sue Burlington." He said that Burlington did not try to talk to him about coverage prior to filing the declaratory judgment action. On cross-examination, Anderson admitted that he had never read the entire policy, and that he never told Burlington that a motor vehicle was pulling the hayride. He assumed that the hayride was covered, because when he obtained the insurance for Flynn's Lick, he requested coverage for a hayride.

Burlington's coverage adjuster Fulbright did not attend the trial, but portions of his deposition were read into evidence by agreement of the parties.[5] In his deposition, Fulbright said that Burlington separated the defense and coverage aspects of the Flynn's Lick claim. Fulbright was assigned to handle the coverage issues, and Cleaver was assigned to handle the defense issues. Fulbright made the decision to settle the underlying lawsuits against Flynn's Lick, and Burlington paid about $60,000 to $70,000 in settlements. Fulbright testified that, in his opinion, the Flynn's Lick claim was not covered, because "automobiles are excluded" under the policy. Fulbright was asked why defense adjuster Cleaver, rather than Fulbright, wrote the December 1999 letter regarding coverage. Fulbright responded that in that letter, Cleaver was addressing the defense as well as coverage. Fulbright said coverage was never actually denied to Flynn's Lick, as evidenced by the fact that Burlington continued to provide coverage during the pendency of the federal declaratory judgment lawsuit.

Flynn's Lick's attorney in the declaratory judgment action, Mike Evans ("Evans"), testified at trial as an expert in the field of insurance defense. Evans said that he and attorney Brooks were hired to defend Flynn's Lick. He noted that the insurance policy referred at least four times to coverage for a "Haunted House and Hay Ride," and stated his opinion that Flynn's Lick's claim was covered under the policy.

Evans asserted that, after he had been retained to defend Flynn's Lick in the federal declaratory judgment action, he wrote a letter to Chastain. In the letter, Evans urged Chastain to interview Anderson, and sought to persuade Burlington to drop the lawsuit. Evans received no

[5]Fulbright stated in his deposition that he was the representative for Burlington and that he would be available for trial.

response, so he filed a motion to dismiss Burlington's federal lawsuit. In response, Burlington filed the affidavit of defense adjuster Cleaver, stating the reasons for her belief that there was no coverage for the Flynn's Lick claim. Evans was of the opinion that Cleaver's position was contrary to Burlington's own company policy of splitting the files between the defense and coverage aspects of a case. Evans stated his opinion that Burlington treated Flynn's Lick unfairly because, he believed, Burlington did not actually split responsibility to the Flynn's Lick file between adjusters Cleaver and Fulbright. Evans reasoned that because Cleaver was the adjuster assigned to defend Flynn's Lick in the underlying suits, Cleaver's affidavit stating that coverage did not exist was irreconcilable with her duty to represent the interests of Flynn's Lick. From this, Evans concluded that Burlington did not actually split the file as it should have.

Evans also opined that Burlington should have known that the hayride was to have been pulled by a truck or a trailer, rather than a horse or a mule. Consequently, accidents arising out of the hayride clearly should have been covered, and Burlington should not have relied on the automobile exclusions in disputing coverage. Evans asserted that Burlington should have accepted or denied coverage outright early in the proceeding.

Next, attorney Chastain testified on behalf of Burlington.[6] Chastain addressed Evans' assertion that Burlington treated Flynn's Lick unfairly by not actually splitting responsibility for defense and coverage issues between Cleaver and Fulbright. Consistent with Evans' testimony, Chastain said that insurance companies frequently split files between the defense and coverage aspects of a case, because the adjuster handing the defense aspect has different duties than the adjuster handing coverage issues. The two should not have contact with one another so that the insured is protected from the danger of having the coverage adjuster control the actions of the liability adjuster. Chastain stated that he never talked to defense adjuster Cleaver, and that he worked only with Fulbright.

Chastain asserted that there was no conflict in coverage adjuster Fulbright making the decision to settle the underlying claims. Although Fulbright's action constituted a type of "crossing over" from the coverage side to the defense side of the proverbial "wall," Chastain explained, Fulbright was essentially waiving the coverage defense by agreeing to pay Flynn's Lick's claim and, thus, was justified in breaching the wall.

Chastain also testified that it was not inappropriate for defense adjuster Cleaver to sign the August 1998 letter to Flynn's Lick, called the "reservation of rights" letter, because such a letter is "typically sent from the liability adjuster to the insured." He explained that the December 30 letter, advising Flynn's Lick of the impending declaratory judgment action, was simply "an updating of the reservation of rights" letter. Under these circumstances, Chastain asserted, it was not inappropriate for Cleaver, as the defense adjuster, to write that letter. Chastain said that, though Cleaver signed the affidavit he filed for Burlington in support of the declaratory judgment action, Chastain never

[6]Chastain testified that the primary focus of his law practice is insurance defense work, and that 90% of that work is coverage work, rather than defense work.

talked to Cleaver. Chastain said that he sent the affidavit to Fulbright for Cleaver's signature because Cleaver was the person who signed the letters written to Flynn's Lick.

Chastain also testified about his investigation of Flynn's Lick's case and the decisions regarding the federal declaratory judgment action. He read the policy and obtained information from Fulbright, Ragland, and two others on the circumstances surrounding the October 17 accident. He applied the policy to the facts, and then wrote Burlington his opinion letter concluding that liability from the hayride accident was not covered based on the automobile exclusions. Chastain concluded that coverage was questionable, and suggested to Burlington that it file a declaratory judgment action in federal court to resolve any dispute over coverage.

Chastain also explained his decision not to talk to Anderson before the federal declaratory judgment lawsuit. In considering whether Anderson's actions created coverage by estoppel, Chastain interviewed Ragland, who was the only person at Flynn's Lick who dealt directly with Anderson. Ragland could not recall any representations made by Anderson. From that information, Chastain concluded that there was no coverage by estoppel, and that an interview with Anderson was unnecessary.

Chastain responded to Evans' assertion that Burlington should have either covered the claim or refused coverage outright. Chastain explained that, although he was of the opinion that the claim was not covered, refusing to provide a defense would have been unfair because it would have exposed Flynn's Lick to an undeterminable amount of attorney's fees in the underlying actions. He said "there was no reason to leave Flynn's Lick out there without defense counsel while this declaratory judgment action proceeded," particularly because he thought that the declaratory judgment action could have been expeditiously resolved.

After the underlying suits were settled in June or July 1999, Chastain stated that he advised Burlington to dismiss the declaratory judgment action. He said that Flynn's Lick at that time requested that Burlington pay its attorney's fees in defending the declaratory judgment action, but Burlington refused. The parties entered into a stipulation to dismiss the federal suit, but the stipulation did not contain a provision for attorney's fees.

Finally, Chastain opined that Burlington did nothing unfair or deceptive in resolving this dispute between the parties, and that it acted reasonably. He said that filing the declaratory judgment action "is the normal course for resolving disputes between parties of an insurance contract."

At the conclusion of trial, the jury issued a special verdict in favor of Burlington, determining that Burlington did not act in a manner that was deceptive or unfair under the Act. On November 13, 2002, Flynn's Lick filed a motion for a new trial, which was denied by order dated December 10, 2002. Flynn's Lick now appeals that order.

On appeal, Flynn's Lick argues that the trial court erred in rejecting its motion in limine for a ruling that Burlington waived any right to deny that its insurance policy provided coverage, because

settling the tort claims without a separate reservation of rights was essentially an admission that Flynn's Lick's claims were covered. Next, Flynn's Lick argues that Burlington wrongfully ignored the trial court's ruling that Anderson was an agent of Burlington and could not be portrayed as the agent of Flynn's Lick. In addition, Flynn's Lick claims that the trial court erred in allowing Burlington to explain the absence of a witness through testimony of counsel, and that such explanation was not supported in the record. Finally, Flynn's Lick argues that the verdict of the jury was contrary to the weight of the evidence.

At trial, Flynn's Lick was charged with proving by a preponderance of the evidence that Burlington acted in a manner that was unfair or deceptive under the Act, and that Flynn's Lick suffered a financial loss as a result of that conduct. ***See Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 925 (Tenn. 1998). On appeal, we must determine whether material evidence was admitted at trial to support the jury's conclusion that Burlington did not engage in unfair or deceptive activities that injured Flynn's Lick. ***Brayfield v. Kentucky Nat'l Ins. Co.***, No. 01-A-01-9701-CV-00007, 1998 WL 670389, at *5 (Tenn. Ct. App. Sept. 30, 1998) ; Tenn. R. App. P. 13(d). Under that standard, we do not reweigh the evidence, but rather take the strongest view possible of the evidence in favor of Burlington, and discard evidence to the contrary. ***Smith County v. Eatherly***, 820 S.W.2d 366, 369 (Tenn Ct. App. 1991). The jury's verdict is given the benefit of all reasonable inferences, and will be set aside only if there is no material evidence to support it. *Id.* Questions of law are reviewed *de novo*. ***See State v. Levandowski***, 955 S.W.2d 603, 604 (Tenn. 1997); ***Ridings v. Ralph M. Parsons Co.,*** 914 S.W.2d 79, 80 (Tenn. 1996); ***Jacobs v. Singh***, No. M2001-00697-COA-R3-CV, 2002 WL 27821, at *2 (Tenn. Ct. App. Jan. 11, 2002).

Flynn's Lick first argues that the trial court erred in refusing to grant its motion in limine for a ruling that Burlington waived any right to deny that its policy provided coverage for the October 17 accident. Flynn's Lick maintains that "a key basis of Burlington's defense in this case was that it actually did not have any coverage obligation under its insurance policy," and that allowing Burlington to maintain such a defense constituted legal error. In support of its argument, Flynn's Lick cites ***Allstate Ins. Co. v. Dixon***, No. 01-A-01-9011CH00421, 1991 WL 79549 (Tenn. Ct. App. May 17, 1991). In ***Dixon***, the Court held that, when an insurance company pays to settle the insured's case without a proper reservations of rights, the insurance company cannot then prevail in a declaratory judgment action in which it asserts that coverage does not exist. ***Dixon***, 1991 WL 79549, at *5. Flynn's Lick argues that, because Burlington did not execute an additional reservation of rights when it settled the underlying lawsuits in this case, the trial court should have ruled that Burlington was prohibited from asserting at trial that Flynn's Lick's claim was not covered under the policy.

In ***Dixon***, the issue was whether the insurance company could deny coverage after it had paid as a settlement in the underlying case without signing a separate reservation of rights. In contrast, the issue in the instance case is not whether Burlington is entitled to deny coverage, but rather, whether Burlington's act in initially refusing coverage and filing the federal declaratory judgment lawsuit was unfair or deceptive under the Tennessee Consumer Protection Act. Consequently, ***Dixon*** is inapplicable. The evidence that Flynn's Lick claims was erroneously admitted is directly

relevant to a determination about whether Burlington's conduct was unfair or deceptive. Thus, the trial court did not err in permitting Burlington to put on proof as to the reasons for its initial decision that coverage did not exist and for implementing the federal declaratory judgment lawsuit.

Flynn's Lick next argues that the trial court should have ordered a new trial because Burlington ignored the trial court's pre-trial ruling that agent Anderson was an agent of Burlington and could not be portrayed as an agent of Flynn's Lick. Flynn's Lick asserts that Fulbright's deposition, read into evidence at trial, implied misconduct or ignorance on the part of Anderson. Flynn's Lick also notes that Anderson was questioned about why he did not read the entire policy and why he did not mark certain portions of the policy. In that way, Flynn's Lick argues, counsel for Burlington sought to mislead the jury by placing blame on Anderson, rather than Burlington, when in fact Anderson was Burlington's agent. Thus, Flynn's Lick ignored trial court's pre-trial ruling that Anderson was an agent of Burlington. Flynn's Lick admits that it did not object to Burlington's conduct in this respect at trial, but maintains that further objection is not needed after a definitive ruling on the subject has been made on the record. ***See*** Tenn. R. Evid. 103.

The record in this case shows that the jury heard considerable testimony and explanation of Anderson's role. Anderson testified candidly that he saw himself as Flynn's Lick's agent, and stated that he thought that the loss would be covered. The trial judge instructed the jury in accordance with his pre-trial ruling, stating that "Mr. John Anderson is an agent of the Defendant, Burlington Insurance Company." Burlington was entitled to argue the facts surrounding Anderson's relationship with Burlington, facts that were put into evidence without objection. ***See Rogers v. Murfreesboro Housing Auth.***, 365 S.W.2d 441, 446 (Tenn. Ct. App. 1962) ("Attorneys may argue to a jury all logical inferences to be drawn from proven facts. And considerable latitude is permitted in the statement of counsel as to conclusions to be drawn from the evidence."). The jury was entitled to consider the evidence and apply the facts according to the jury instructions. Under these circumstances, the trial court did not err in permitting evidence which gave a complete picture of Anderson's role in the events that gave rise to this lawsuit.

Flynn's Lick argues further that the trial court erred in allowing Burlington to explain the absence of a "missing witness," a company representative from Burlington, through statements of counsel regarding facts not in the record. In closing arguments at trial, Burlington's counsel indicated that no Burlington company representative was present at trial because no one was willing to risk travel by air because of the tragic events that occurred on September 11, 2001. He stated:

> Mr. Fulbright they're saying, they may say . . . [w]hy is Mr. Fulbright not here? Well, his deposition was read. They deposed him. It's a week after what happened in New York [on September 11, 2001].
>
> I have all the proof I need with this man right here. I don't need to fly him over here or drive him over here. Who did the legal work? Mr. Chastain. Who did the investigation? Mr. Chastain. Who made the recommendations? Mr. Chastain. Who filed the lawsuit? Mr. Chastain. Who litigated the declaratory judgment action? Mr.

Chastain. Who can explain to you why he gave his recommendations? Mr. Chastain. Who had the contact with Mr. Brooks and Mr. Evans? Mr. Chastain.

Based on the absence of a company representative, Flynn's Lick requested and was given a "missing witness" jury instruction. Flynn's Lick argues, however, that the jury instruction was effectively nullified by Burlington's statement in its closing argument, exploiting a national tragedy when, in fact, no evidence was adduced at trial to support Burlington's explanation.

The statement in Burlington's closing argument, however, must be viewed in context. Burlington's one-sentence reference to "what happened in New York" was followed by an explanation that live testimony from a company representative was unnecessary because Chastain, who testified at trial, was the primary decision maker for Burlington. In light of the fact that Flynn's Lick was granted a "missing witness" jury instruction, the reference to "what happened in New York" was innocuous and does not justify the granting of a new trial. The trial court's denial of Flynn's Lick's motion for a new trial on this basis is affirmed.

Flynn's Lick argues that the jury's verdict was contrary to the weight of the evidence. It emphasizes the fact that Burlington permitted coverage adjuster Fulbright and defense adjuster Cleaver to "cross over" the wall between the defense and coverage aspects of the claims, arguing that this established that Burlington acted unfairly and improperly. It also argues that Burlington knew or should have known that the hayride was pulled by a truck or a tractor, and that it acted unfairly in invoking the "automobile" exclusion from coverage.

The focus of our inquiry must be whether there was material evidence to support the jury's conclusion that Burlington's actions did not constitute an unfair or deceptive act under the Tennessee Consumer Protection Act. Here, Burlington introduced into evidence testimony which provided the jury a cogent explanation for its actions and decisions. As to the alleged unfairness of Burlington's reliance on the automobile exclusion, Burlington put on substantial evidence that it had a reasonable basis for relying on the exclusion. Flynn's Lick emphasizes that Burlington did not talk to Anderson before instituting the declaratory judgment action, but even Anderson testified that he was not aware prior to the accident that the hayride was pulled by a truck or tractor. Clearly, there was material evidence to support the jury's conclusion that Flynn's Lick did not prove that Burlington engaged in an unfair or deceptive act under the Tennessee Consumer Protection Act.

Finally, Flynn's Lick argues that Burlington was estopped from denying coverage because Anderson, who was Burlington's agent, understood that coverage for the hayride existed, even though it was being pulled by a truck. Coverage by estoppel, however, is established by what the insured believed based on the representations of the agent. ***See Bill Brown Constr. Co. v. Glens Falls Ins. Co.***, 818 S.W.2d 1, 11-12 (Tenn. 1991). Evidence proffered by Burlington showed that Ragland told Chastain that he did not remember any statements made by Anderson about coverage when he was procuring the policy for Flynn's Lick. Anderson testified that he believed that the hayride would have been covered under the policy, but he also acknowledged that he had never read the policy, that he knew it was not an all-risk policy, and that he did not know when he obtained the

policy for Flynn's Lick that the hayride was to be pulled by a truck. Under the circumstances, Flynn's Lick's argument regarding coverage by estoppel must be deemed without merit.

The decision of the trial court is affirmed. Costs are to be taxed to the appellant, Flynn's Lick Community Center & Volunteer Fire Department, and its surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, J.